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## About Capitalism and Private International Law

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### 1. Private International Law and the production of “Dark Value”

The internationalization of production and the shift from vertical integration to contractual links are presenting courts with new challenges when judges are asked to redress violations that occur at different points of the supply chain. In the struggle for global governance and corporate accountability, the fact that slavery, forced labor, violations of *jus cogens* and environmental disasters take place beyond borders already poses legal concerns and raises significant obstacles. When the same events are realized by third party contractors that only have a contractual obligation and that may operate several tiers away from the lead firm, the possibility that victims obtain some form of satisfaction appears even more unlikely.<sup>1</sup>

This is recognized by Susan Marks when she states that “[n]ational governments, even the most powerful among them, face growing difficulty in controlling the activities of business, and especially finance, is today very widely acknowledged. The question of the significance of this development for nation-state-based systems of power is considered by many to be one of the most important political questions of our age.”<sup>2</sup> The case under analysis, along with others that were brought in the past and others that will follow, reflects the evolving interactions between law, territory and corporate accountability. In particular, it is characterized by the 9<sup>th</sup> Circuit Court’s attempt to elaborate a legal framework that can cope with the dual nature of supply chain capitalism as contemporary constructed around the ideas of order and coherence, on the one hand, and of chaos and fragmentation, on the other hand. As discussed below, firms that occupy a leading position in transnational supply capitalism are increasingly paying attention to the transparency, traceability, and standardization of their supply chains:

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<sup>1</sup> See, e.g. Anner, Mark, Jennifer Bair and Jeremy Blasi, 'Towards Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks', 35 *Comparative Labor Law and Policy Journal* 1 (2013), 1-43; Kevin B Sobel-Read, 'Global Value Chains: A Framework for Analysis', 5 *Transnational Legal theory* (2014) 364-407; Naomi Jiyoung Bang, 'Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases', 35 *Houston Journal of International Law* (2013); Galit A. Sarfaty, *Shining Light on Global Supply Chains* (2014), available from <http://papers.ssrn.com/abstract=2512417> (last visited Dec 29, 2014); Stephanie Barrientos, '“Labor Chains”: analysing the role of labour contractors in global production networks' (2011), <https://ideas.repec.org/p/bwp/bwppap/15311.html> (last visited Dec 29, 2014).

<sup>2</sup> Susan Marks, 'Empire's Law (The Earl A. Snyder Lecture in International Law)', 10 *Indiana Journal of Global Legal Studies* 1 (2003). See also Michael Hardt and Antonio Negri, *EMPIRE* (2000)

control, organization, efficiency and public concern require it. On the other hand, it can be claimed that the goal of profit maximization is best achieved by deciding not to control some areas and some aspects, i.e. by refraining to assess the dark spots of production, favoring their preservation, and profiting from the cheapness of labor, nature, food and resources.<sup>3</sup> It is the engagement with the boundary between chaos and order that makes *Doe v Nestle et al.* important and that would require to be addressed further.

## 2. Taking contracts-based capitalism seriously

It may seem anachronistic to discuss an Alien Tort Statute case after the *Kiobel* judgment. It is known, in fact, that most of the decisions that were issued in the aftermath of that milestone decision had to bow to the stringent concept of ‘touch and concern’ formulated by Justices Scalia and Alito. Almost all the cases were thus dismissed at the jurisdictional stage, without even the possibility to questioning the matter of convenience of the forum – let alone the substance of the claim. As a consequence, the non-jurisdictional points that are raised in these cases – both by parties and judges – often end up forgotten. This may be the future of the case under scrutiny, which would be a shame given the Court of Appeal’s innovative proposal to move beyond the idea of legal and territorial chaos and to identify ways to make the productive and economic coherence of supply chains legally relevant.

In fact, the Nestle case offered the plaintiffs and the court a unique opportunity to deal with an issue that several authors consider among the most problematic aspects of supply chain capitalism, i.e. subcontracting and the allocation of liability that it generates among its actors. For example, Stephanie Barrientos stated that “[t]hird party labour contractors are increasingly prevalent in Global Production Networks, and are a potential channel for ‘new forms of slavery.’”<sup>4</sup> Similarly, Anner, Bair and Blasi conclude that “[t]here is widespread consensus that twenty years of efforts to address poor working conditions and violations of workers’ rights in global supply chains for apparel products have been mostly unsuccessful.”<sup>5</sup>

More recently, Naomi Jiyoung Bang intervened in the debate defining supply chain contracts as a charade that covers the fact that “[c]orporations using global production chains, containing multiple levels of subcontracting and outsourcing, breed human trafficking and forced labor” and allow them to “easily avoid accountability given the

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<sup>3</sup> Anna L. Tsing, *The Mushroom at the End of the World: on the Possibility of Life in Capitalist Ruins* (1<sup>st</sup> ed, Princeton University Press, 2015); Jason W. Moore, *Capitalism in the Web of Life* (1<sup>st</sup> ed, Verso Books, 2015).

<sup>4</sup> Stephanie Barrientos, ‘Labour chains’: analysing the role of labour contractors in global production networks’ (2011), <https://ideas.repec.org/p/bwp/bwppap/15311.html> [last visited Dec 29, 2014]

<sup>5</sup> Mark Anner Jennifer Bair Jeremy Blas, ‘Buyer Power, Pricing Practices, and Labor Outcomes in Global Supply Chains’, IBS working paper (2012) available from <http://www.colorado.edu/ibs/pubs/pec/inst2012-0011.pdf> [last accessed January 29th, 2015].

extraterritorial location of the suppliers, and the appearance of ‘arm’s length’ contracts with their suppliers.”<sup>6</sup> For Hayashi “Contracting out the production part of their business has enabled manufacturers to minimize their investment and insulate themselves from instability and risk. By characterizing their relationship with contractors as independent, they have avoided legal responsibility for workers’ compensation, unemployment insurance and fringe benefits.”<sup>7</sup>

Facing a system of production that is increasingly global and shifting from property (direct control through foreign direct investments and shareholding) to contract (purchase agreements and mediated connections), the Circuit Court tried to develop a legal reconstruction of the supply chain that may be capable of addressing this double transition and providing responses to violations and forms of exploitation that may take place behind the contract veil. Although temporarily frustrated by the trump card of jurisdiction, *Nestle* represents an attempt to engage with the complexity of production and to move beyond the double use of contractual agreements both as sources of unity for the chain and as tools to create legal distance, fragmentation and impunity.

As discussed below, the Ninth Circuit’s opinion in *Nestle* offers a combination between territory, contracts and lead firms’ actions to overcome the geographical and legal fragmentation that are crucial to the economic success of transnational chains. The claim highlights the extent to which contemporary legal understanding of transnationality are lagging behind the reality on the ground. It brings to light the need to combine the economic and legal elements of the cocoa supply chain to define a distribution of legal responsibilities that is ultimately more reflective of the value distribution and economic power of that specific chain. Whether this position will be successful in the future, it also depends on the possibility for its elements to be known and discussed.

### **3. Redefining ‘Aiding and Abetting’ at the Time of Supply Chain Capitalism**

When it comes to providing solutions to the fact that contracts normally shield lead companies (in the Global North) from accountability, different approaches have been suggested. For example, Anner et al. propose a proactive intervention and to extend the idea of the ‘jobbers agreements’ at the transnational level, i.e. to expand the use of the trilateral contracts concluded between contractors, intermediaries (jobbers) and workers’

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<sup>6</sup> Naomi Jiyoung Bang, ‘Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases’, 35 *Houston Journal of International Law* [2013] (footnotes omitted). See also Special Rapporteur on the Human Rights of Migrants, Specific Groups and Individuals Migrant Workers, Comm’n on Human Rights, U.N. Doc. E/CN.4/2006/73 (2005), at 2; ESCOR, 62d Sess. (Dec. 30, 2005).

<sup>7</sup> Dennis Hayashi, ‘Preventing Human Rights Abuses in the U.S. Garment Industry: A Proposed Amendment to the Fair Labor Standards Act’ (1992) 17 *YALE J. INT’L L.* 195, 199.

unions that were useful to improve the labor conditions in sweatshops in the 20th century in the USA.<sup>8</sup> Another possibility would be to transnationalize the doctrine of the 'joint-employer doctrine', i.e. the recognition that independent contractors often are simply interposed between workers and final beneficiaries and the identification of common responsibilities towards workers.<sup>9</sup> This was, for example, the attempt advanced in *Doe v. Wal-Mart Inc*, a case that was brought – and dismissed – against the US parent and several subsidiaries to recognize the former's liability for misconducts of the formers.<sup>10</sup>

Recently, Bang proposed to extend the economic reality test from the national to the transnational level, an operation to be realized by adopting an elaborated *ex post* jurisdictional strategy that consists of two prongs: first, the courts of the corporations' home state should apply the "economic realities test as a vehicle to determine the existence of joint employment between a corporation and their contractor."<sup>11</sup> Secondly, courts should extend the scope of domestic legislation to cover extraterritorial conduct, if it can be indirectly attributed to national corporations.<sup>12</sup>

Another pattern followed by plaintiffs and courts in the USA is represented by the notion of 'aiding and abetting', i.e. the possibility to recognize secondary liability to a violation of law without direct participation. In the US national context, the parameter is generally

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<sup>8</sup> See Anner Bair and Blasi, n 5, p 13 ("The jobbers agreement served as the lynchpin of a system that was sometimes called triangular collective bargaining—so named because the goal was to regulate, via a set of paired contractors and jobbers agreements, relations between the three 'sides' of the production triangle: the workers as represented by the union, and the jobbers and contractors, each represented by their own employers association. Yet among these three parties to the agreement, the jobber was clearly recognized to be the most powerful industry actor and the only one capable of safeguarding the wages and working conditions of garment workers in contracting shops"). Such contracts would deprive corporations of the possibility to deflect responsibilities by the interposition of intermediaries and would multiply standing and the venues to obtain their enforcement. However, they would require an active involvement of all the parties – unlikely to happen without sufficient pressure both on buyer corporations and subcontractors – and attention in the definition of the governing rules and adjudicatory venues.

<sup>9</sup> *Castillo v. Case Farms of Ohio* [1999] W.D. Tex 96 F. Supp. 2d 578, 596.

<sup>10</sup> *Doe v. Wal-Mart Inc* [2009] 9<sup>th</sup> Cir. 572 F.3d 677. In that case, the court affirmed that the common law test for joint-employment required 'the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed.'" The court equated the concept of "control" to physical proximity as well as frequency of contact, holding that "[a] finding of the right to control employment requires . . . a comprehensive and immediate level of 'day-to-day' authority over employment decisions." The content of the supply-contract and the allocations of rights and obligations that it produced were thus considered irrelevant.

<sup>11</sup> Bang, *supra* n 6 at 258.

<sup>12</sup> Bang's application of the economic reality test to the global system of production would thus require courts to take patterns of capital seriously. Judges should move beyond the territorial fragmentation of multiple jurisdictions and at the same time recognize the role of law (in this case of contracts) in distancing the observer from the underlying distribution of power and control. Courts would recognize that global value chains represent the new transnational space of jurisdictional operation and that legal formalism is inconsistent with the way in which capital operates. Foreign subcontractors would thus be 're-territorialized' and considered operating under the control of the domestic corporation, so that buyer and subcontractor would be both equally liable for injuries suffered by overseas factory workers. Borders and contractual formalism would be replaced by transnationality and economic reality, and judges would be the craftsmen. "Essentially", Bang concludes, "the logic is that if the contractor is found to be an employee of a corporation, then its workers are also the corporation's employees" and therefore they could be considered a unity when responsibilities have to be allocated. See Bang, *ibid*, at 279.

satisfied when “(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation.”<sup>13</sup> However, its standards have been at the center of jurisdictional challenges in the context of the ATS and of transnational litigation, in particular because of the transplantation of the notion of ‘purpose’ from international criminal law (Rome Statute) to private international law and corporate accountability cases.<sup>14</sup>

*Nestle* operates within this framework. However, its innovation is represented by the Court’s attempt to fulfil the requirements of ‘aiding and abetting’ by embedding the violations in their economic and legal context, i.e. the cocoa supply chain controlled by the plaintiffs and based on the extraction of value from slave labor. What the Court tried to do, was to give relevance to the plaintiffs’ active involvement in enforcing coherence and control along the chain (by enforcing standards, checking production, having access to the land where the cocoa was produced, etc.) and, at the same time, to the actions or omission aimed at maintaining a space of darkness, chaos and lack of accountability.

In the court’s interpretation of the link between supply chains and law, the contractual construction of supply chains as a commercially reliable space and the existence of dark spots of unaccountability represent the two sides of the same coin which cannot be read separately. Therefore, the exclusivity of the contractual relationship, the quality control exercised by the defendants in order to satisfy their own self-regulation and the interests of the consumers, and the transfer of technology and resources to guarantee the needed supply (all expressions of order and coherence), must be read together with the omitted use of the economic leverage deriving from the exclusive buyer/seller contractual agreements, the cost-cutting delocalization which is proper of supply chain capitalism, and the exercise of political lobby in the United States to avoid the introduction of mandatory labeling and reduce the level of transparency.

#### **4. Cheapness at the Beginning and End of Supply Chain Capitalism**

Another element that deserves attention is the Ninth Circuit’s attempt to prove the existence of *mens rea* by the identification of the profit motive as an indication of purpose. In the Court’s reconstruction, child slaves represented a central element in the establishment and maintenance of the cocoa chain because of the cost-cutting benefits

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<sup>13</sup> *Doe*, 654 F.3d at 34 (citing *Halberstam v. Welch* [1983] D.C. Cir. 705 F.2d 472, 477). *Hauser v. Farrell* [1994] 9th Cir. 14 F.3d 1338, 1343, rev’d on other grounds, *Central Bank of Denver, N.A., v. First Interstate Bank of Denver, N.A.* [1994] 511 U.S. 164; accord *Halberstam v. Welch* [1983] D.C. Cir. 705 F.2d 472, 477.

<sup>14</sup> *Aziz v. Alcolac, Inc.* [2011] 4th Cir. 658 F.3d 388, 399–400; *Presbyterian Church of Sudan v. Talisman Energy* [2009] 2nd Cir., Inc., 582 F.3d 244, 259.

that they represent. Although the defendants were not directly interested in harming children, they were interested in lowering their cost of production – whatever it takes.

According to the Court:

“[T]he defendants placed increased revenues before basic human welfare, and intended to pursue all options available to reduce their cost for purchasing cocoa. Driven by the goal to reduce costs in any way possible, the defendants allegedly supported the use of child slavery, the cheapest form of labor available. These allegations explain how the use of child slavery benefitted the defendants and furthered their operational goals in the Ivory Coast, and therefore, the allegations support the inference that defendants acted with the purpose to facilitate child slavery.”<sup>15</sup>

In the reasoning of the Court, profit, exploitation and responsibility are circularly constructed. The use of cheap labor is seen as a prerequisite to the increase in return and the obtainment by the defendants of a dominant position in the supply chain (at least in Ivory Coast). It is through the exploitation of slave labor and children, the court concludes, that foreign corporations can produce ‘dark value’ (generate non-internalized externalities) in the Ivory Coast and appropriate a higher rent.<sup>16</sup> However, the same market power achieved through exploitation would have required the defendants to intervene and act against their own economic interest. For the Court it is not important how the leading position in a supply chain is obtained: what matters is that this implies obligations and lowers the standard for accountability.

On the contrary, the defendants decided to use their resources and their political power to allegedly lobby against a 2001 United States Congressional proposal to require chocolate manufacturers and importers to certify and label their products as ‘slave free.’ As a result, the mandatory law was replaced by a voluntary arrangement known as the Harkin-Engel protocol, in which the chocolate industry agreed upon certain standards by which it would self-regulate its labor practices.”<sup>17</sup> In a circular way, if slavery and cheap labor lie behind profit and revenues, they also provide the resources that are needed to avoid political and legal interventions that may impact the way in which value is produced and accumulated.<sup>18</sup>

## 5. Law and Transnational Global Production

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<sup>15</sup> *Doe*, 654 F.3d, at 22.

<sup>16</sup> It is my opinion that the massive violations of human rights committed by the government in Sudan should not be kept separated from the case of child labor in Ivory Coast. If the threshold to determine that the defendant purposefully aided and abetted a violation of international law is represented by the economic benefit that it obtains, it could be claimed that Talisman Energy obtain an economic benefit because of the reduced social opposition, the lower costs of labor and the cheaper access to resources.

<sup>17</sup> *Doe*, 654 F.3d, at 1066.

<sup>18</sup> Raj Patel and Jason W. Moore, *A History of the World in Seven Cheap Things: a Guide to Capitalism, Nature and the Future of the Planet* (1<sup>st</sup> ed, University of California Press 2017).

To conclude this short note, I would like to stress the importance of the Ninth Court's focus on the just mentioned lobbying operations realized by the defendants in a jurisdiction that is not the same where the violations occurred. Implicitly, the judges recognize that legal interventions at the domestic level can introduce disturbances in the supply chain and impact the way in which value and power are allocated throughout all actors and nodes.<sup>19</sup>

Although lobbying is not considered a violation per se, the position of the court reveals two aspects of the complex interaction between value chains and legal structures: a) that corporations are aware that the mechanism of extraction and appropriation of capital throughout the chain could be modified by legal interventions that do not take place there where exploitative conducts take place – for example by reforming the legal framework in the country where the final products are sold rather than where natural resources are extracted; b) that the current system of law is, in most cases, incapable of coping with transnational forms of production and that the status quo is reproductive of inequalities and legalized violence.

From the perspective of law in Global Production, courts' lax attitude toward misconducts realized beyond national boundaries produces a judicially-created incentive for incorporating, offshoring and outsourcing. The geography and forms of production are, therefore, deeply intertwined with the spatial extension of jurisdiction and the identification of the content and applicability of a set of legal tools, in particular those of private international law and tort law. More than one decade ago, Saskia Sassen noted that the relation between the global capital economy and national states is not adequately or usefully captured by the use of a clear-cutting distinction between global and national. According to Sassen, "[t]his duality is conceived of as a mutually exclusive set of terrains where what the global economy gains the national economy or the national state loses. It is this type of dualism that has fed the proposition of declining significance of the national state in a globalized economy. Such a dualist perspective also resists the recognition that we may be dealing with a new bundle of practices that are stabilizing new meanings of sovereign power and constituting new institutional locations for components of this power."<sup>20</sup>

Instead of passively suffering for the globalization processes that operate beyond the scope of government, courts all over the world have been increasingly required to interrogate this duality. To paraphrase Anna Tsing, these interventions may create spaces of transformative encounters along the supply chains, making new legal assemblages and new distribution of power possible.<sup>21</sup> Where they take, it is often hard to foresee. In this

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<sup>19</sup> Anna L. Tsing, *supra* n 3, p. 160; Tomaso Ferrando, 'Land Rights in Global Production: Leveraging Multi-Spatiality and "Legal Chokeholds"' (2017) 2 Business and Human Rights Journal 2.

<sup>20</sup> Saskia Sassen, 'Territory and Territoriality in Global Economy' (2000) 15 *International Sociology* 2, at 376.

<sup>21</sup> do not share the plaintiffs' position that the introduction of a certification scheme would have been such that "Defendants' cocoa plantations would not have been able to use child labor." A critical approach to law requires considering the indeterminacy of regulation, the multiplicity of its interpretation, and the role that context, power, and



context, some courts - including the Supreme Court in *Kiobel* - have adopted territorial reconstructions of their jurisdictions that “do not fit globalization and the transcendence of territorial border”<sup>22</sup> or dismissed the role of control and chaos as two complementary elements of supply chains. Thus, they take legal decisions that create spaces of legal impunity that contribute to the consolidation of an exploitative form of supply chain capitalism based on the combination between 'dark and bright value'.<sup>23</sup> Others have tried to think differently.

Among these, the Ninth Circuit in *Doe v Nestle et al.* teaches us that the “allegedly ‘external’ processes of globalization should be seen as distinctly co-evolving with and as being produced, constructed and conceived *within* the nation state.”<sup>24</sup> It also proves that Moore and Princen may be right when they affirm that contemporary transnational capitalism is constructed on the extraction of dark value via the production and accumulation of cheap labor, cheap nature, cheap food and cheap natural resources.<sup>25</sup> At the same time, it highlights the potential implications of higher levels of control that are imposed in the name of sustainability of their supplies and safety of the consumers. In this tension between order and chaos, *Nestle* suggests to engage with the role of law in the production and extraction of value along the supply chains (both through control and darkness) and sounds like a clear invitation to private international lawyers to be at the forefront of this new intellectual and practical endeavor.

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asymmetries play in determining its consequences. However, the existence of a mandatory system of labelling and certification, supported by an appropriate mechanism of control and complaints, may have improved the conditions of cocoa workers throughout the chain (and not only in Ivory Coast).

<sup>22</sup> Ralf Michaels, ‘Empagran’s Empire: International Law and Statutory Interpretation in the US Supreme Court of the Twenty-First Century’, in David L. Sloss, Michael D. Ramsey and William S. Dodge (eds.) *International Law in the US Supreme Court* (1<sup>st</sup> ed., Cambridge University Press, 2009), at 539.

<sup>23</sup> See Donald A. Clelland, ‘The Core of the Apple: Dark Value and Degrees of Monopoly in Global Commodity Chains’ (2014) 20 *Journal of World-Systems Research* 1.

<sup>24</sup> Peer Zumbansen, ‘Defining the Space of Transnational Law’, in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds) *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Queen Mary Studies in International Law, Leiden: Brill, 2012). See also some of the seminal works by Saskia Sassen, e.g. Saskia Sassen, ‘Globalization or denationalization?’, 10 *Review of International Political Economy* (2003); Saskia Sassen, *The Global City: New York, London, Tokyo* (2013); Saskia Sassen, *The Mobility of Labor and Capital: A Study in International Investment and Labor Flow* (1990).

<sup>25</sup> Thomas Princen, ‘The Shading and Distancing of Commerce: When Internalization Is Not Enough’ (1997) 20 *Ecological Economics* 3; Jason W. Moore, *Capitalism in the Web of Life* (supra n 3); Patel and Moore, *A History of the World in Seven Cheap Things* (supra n 18).